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IN THE

Supreme Court of the United States

October Term, 1957

No. 808

MORRIS MAC SCHWEBEL,
Petitioner,

—v.—

ANDREW D. ORRICK, HAROLD C. PATTERSON, EARL F. HASTINGS, JAMES C. SARGENT,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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IN THE

Supreme Court of the United States

October Term, 1957

No.

MORRIS MAC SCHWEBEL,

Petitioner,

v.

ANDREW D. ORRICK, HAROLD C. PATTERSON, EARL F. HASTINGS, JAMES C. SARGENT,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in the above entitled case on January 30, 1958.

Citations to Opinions Below

The opinion of the District Court (R. 46a-54a) is reported in 153 F. Supp. 701. The opinion of the Court of Appeals (printed in Appendix B hereto, *infra*, pp. 18-19; also R. 57) is not yet officially reported.

Jurisdiction

The judgment of the Court of Appeals was dated and entered on January 30, 1958 (*infra*, p. 20; also R. 58). The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254(1).

Question Presented

In a proceeding instituted by the Securities and Exchange Commission (hereinafter sometimes referred to as the "Commission") before itself to determine whether petitioner should be disqualified from practicing as an attorney before it, petitioner moved the Commission to dismiss the proceeding on the grounds (1) that the Commission was without statutory authority to conduct such a proceeding, and (2) that in any event the proceeding had been instituted in violation of Section 9(b) of the Administrative Procedure Act. The Commission considered and denied the motions on their merits. Petitioner thereupon sought a judicial determination of the same questions, by means of an action for an injunction and declaratory judgment.

The question presented is whether the court below erred in holding that, even though the Commission had considered and passed upon the issues as to its statutory authority and as to the legality of its action, petitioner must still "exhaust his administrative remedy" before seeking judicial determination of these issues.

Statute and Regulations Involved

The statute involved is the Administrative Procedure Act, 60 Stat. 237, particularly Sections 2(e), 3(a), 6(b), 9(b), 10(a), (b) and (c) thereof (5 U. S. C., Sections 1001(e), 1002(a), 1005(b), 1008(b), 1009(a), (b) and (c)). Also involved is Rule II of the Rules of Practice of the Securities and Exchange Commission. The pertinent parts of the statute and regulations are set forth in Appendix A hereto, pp. 13-17, *infra*.

Statement

In late 1956 the Commission initiated what are commonly known as "delisting proceedings" against two Canadian oil companies, charging that certain reports filed by them under Section 13 of the Securities Exchange Act of 1934, 48 Stat. 894, 15 U. S. C., Section 78m, contained false and misleading statements. After hearing, the Commission on April 8, 1957, issued an order directing that the registrations of the securities of the two companies on the American Stock Exchange be withdrawn (*In the Matter of Great Sweet Grass Oils, Ltd., and Kroy Oils, Ltd.*—Securities Exchange Act Release No. 5483, April 8, 1957). Petitions for review of the Commission's order are pending in the court below.

Following the completion of the *Great Sweet Grass* proceedings before it the Commission on May 6, 1957, promulgated a document entitled "Notice of and Order for Private Hearing Pursuant to Rule II(e) of the Rules of Practice". This document (R. 8a-13a), after reciting that the petitioner herein was an attorney practicing before the Commission and at all times mentioned therein had acted as American counsel for Great Sweet Grass Oils, Ltd., and Kroy Oils, Ltd., charged that petitioner, in connection with his representation of these oil companies and of certain securities dealers in the United States, had engaged in certain specified activities or inactivities which in the Commission's view constituted unethical and unprofessional conduct. The order fixed a date for a private hearing [1] for the purpose of taking evidence on the charges, to determine whether petitioner should be temporarily or permanently disqualified from and denied the privilege of appearing or practicing before the Commission.

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[1] By agreement of the parties hereto this hearing has been postponed pending the determination of this action.

On June 10, 1957, the petitioner filed with the Commission a motion to dismiss its disciplinary proceeding against him on the ground of want of jurisdiction; and on June 17, 1957, petitioner further moved to dismiss the proceeding on the ground that the same had been instituted in violation of Section 9(b) of the Administrative Procedure Act, 60 Stat. 242, 5 U. S. C., Section 1008(b). These motions were denied by the Commission in a Memorandum Opinion and Order issued on June 20, 1957 (R. 19a-28a).

Thereafter petitioner, on June 24, 1957, commenced an action in the United States District Court for the District of Columbia against the then four incumbent members of the Securities and Exchange Commission. Briefly stated, the grounds for relief set forth in the complaint were (1) that the defendants (respondents here) were without authority in law to institute or continue the pending disciplinary proceeding against petitioner or to issue any order disciplining him, and (2) that in any event the proceeding had been instituted in violation of Section 9(b) of the Administrative Procedure Act, in that no written notice of complaint and "opportunity to demonstrate or achieve compliance with all lawful requirements" had been accorded to petitioner *prior to the institution* of the proceeding, as required by that section. Jurisdiction in the District Court was invoked under 28 U. S. C., Sections 1331 and 2201, and Section 10 of the Administrative Procedure Act, 5 U. S. C., Section 1009.

The complaint sought a permanent injunction against further prosecution of the disciplinary proceeding, and a declaratory judgment that Rule II(e) of the Commission's Rules of Practice (under which the proceeding was purportedly instituted) is invalid and not authorized by law, and that respondents' actions in instituting and continuing the proceeding were in violation of Section 9(b) (as supplemented by Sections 3(a) and 6(b)) of the Administrative Procedure Act.

Following the filing and service of the complaint petitioner moved in the District Court for a preliminary injunction. Respondents countered by moving to dismiss the action (1) because the complaint failed to state a claim upon which relief could be granted, and (2) on the ground that the court lacked jurisdiction over the subject matter. The motions were argued together, and on July 12, 1957, the court rendered its opinion (R. 46a-54a), holding in effect:

> (1) That in the particular circumstances of this case petitioner had the right, without first exhausting any further administrative remedies, to secure a judicial determination of the validity of the Commission's Rule II(e) and of the Notice of and Order for Hearing purportedly issued thereunder, and that the court accordingly had jurisdiction of the subject matter.
>
> (2) That the Commission's Rule II(e) constituted a valid exercise of rule-making power conferred on it by statute.
>
> (3) That the Commission's right to proceed against petitioner was conditioned by the requirements of Section 9(b) of the Administrative Procedure Act, but that the Commission had met those requirements.

Accordingly, the District Court concluded (R. 54a) that the complaint should be dismissed, and that it followed that the petitioner's motion for a preliminary injunction should be denied. An Order and Judgment to this effect was entered on July 18, 1957 (R. 55a).

The Court of Appeals affirmed, but not on the grounds advanced by the District Court in its opinion. Indeed, it held that the District Court had "erred in ruling on the Commission's authority to disbar attorneys." Affirmance was based solely on the ground that the complaint should have been dismissed because petitioner had "failed to ex-

haust his administrative remedy". No consideration was given by the Court of Appeals to the merits of petitioner's claim (see opinion, Appendix B, pp. 18-19, *infra*).

Reasons for Granting the Writ

1. It is respectfully submitted that the court below has misunderstood and misapplied the doctrine of "exhaustion of administrative remedies", and in doing so has decided a federal question in a way in conflict with applicable decisions of this Court.

This Court has held repeatedly, over many years, that where the claim is made that an administrative agency "has exceeded its statutory powers • • • the courts have jurisdiction of suits to enjoin the enforcement of an order, even if the plaintiff has not attempted to secure redress in a proceeding" before the agency itself. *Skinner & Eddy Corp.* v. *United States*, 249 U. S. 557, 562. *Cf. Gonzales* v. *Williams*, 192 U. S. 1, 15; *Public Utilities Comm.* v. *United Fuel Gas Co.*, 317 U. S. 456, 469; *Federal Power Commission* v. *Panhandle E. P. L. Co.*, 337 U. S. 498, 515; *Allen* v. *Grand Central Aircraft Co.*, 347 U. S. 535, 540-541.

Here, the claim is just what was described in the *Skinner & Eddy Corp.* case, *supra*. Petitioner claims that in the absence of implementing regulations creating a bar of attorneys the Commission has no statutory power to disbar attorneys from practice before it, or to institute proceedings to that end. Petitioner also claims that by Section 9(b) of the Administrative Procedure Act Congress has prohibited the institution of such proceedings unless a condition precedent—written notice and "an opportunity to demonstrate or achieve compliance"—is met prior to the institution of the proceedings. Under applicable decisions of this Court petitioner is entitled to a judicial determination of the validity of these claims before being required to subject himself to a long and expensive hearing involving the sensitive issue of his professional reputation.

In support of its contrary conclusion the court below cited but one authority, its own decision in *Camp* v. *Herzog*, 190 F. 2d 605 (1951). There, as here, an administrative agency had instituted a disbarment proceeding before it. Injunction to forestall the hearing was similarly sought, and denied on the ground of failure to exhaust administrative remedies. In the court's view the practitioner was precluded from seeking judicial determination of the agency's authority to conduct such a proceeding until two things had occurred: (1) the agency had had an opportunity to make a first-instance decision as to the extent of its own authority; and (2) the agency had had an opportunity to decide on the merits whether the practitioner's conduct deserved discipline. If the agency should resolve either question against itself, the need for judicial intervention would disappear.

In fact, there, the need for judicial intervention did not disappear. At the conclusion of the proceeding the agency issued an order imposing discipline. There being no statutory review mechanism covering such an order, the practitioner applied again to the District Court on exactly the same grounds—*i.e.*, lack of agency authority to institute the proceedings—this time asking a judgment vacating the final order. Such a judgment was granted, on the ground that after all the agency *was* without authority to institute the proceeding. *Camp* v. *Herzog*, 104 F. Supp. 134 (D. C. 1952).

In the instant case at least the first condition imposed by the court below in the *Camp* case has been met. The issue of the Commission's authority has been presented to it, by petitioner's motions made on June 10 and 17, 1957 (R. 16a-18a). By denial of those motions (R. 19a-28a) the Commission has decided in favor of its own authority. When, therefore, the court below requires petitioner "to exhaust his administrative remedy", it can mean only that petitioner must subject himself to the full hearing and de-

cisional process of the Commission before he may draw into question in the courts the authority of the Commission to hold the hearing at all.

The court below, by citing its own *Camp* decision, incorporates by reference the three decisions of this Court there relied on in support of its position. Those are *Aircraft & Diesel Equipment Corp.* v. *Hirsch*, 331 U. S. 752, *Macauley* v. *Waterman S.S. Corp.*, 327 U. S. 540, and *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U. S. 41.

Without attempting a full rationalization of those decisions, we may say that in each instance Congress had explicitly established an administrative procedure for determining the facts involved, and in each instance the facts, as they might be administratively found, might well have had a bearing on the ultimate judicial decision as to the scope of the agency's authority.

Here, the contrary is the case. The Commission's authority to conduct disbarment proceedings is at best only an implied one (see District Court opinion, at R. 50a). Moreover, nothing that can occur at a hearing under the Commission's order, no findings of fact or discretionary determinations by the Commission, can possibly affect the question whether the order for hearing was void for illegality and want of statutory authority. That, we respectfully submit, is a question for judicial determination now, not after lengthy administrative proceedings which cannot possibly develop any considerations bearing on its determination.[2]

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[2] It is to be noted that although respondents have advanced generally the doctrine of "exhaustion of administrative remedies" as precluding this action for a judicial determination of the legality of the Commission's proposed proceeding, they have at no time suggested that any facts might be developed in the administrative proceeding which could have any bearing on that issue of legality. By themselves deciding in the first instance (against petitioner) petitioner's motions to dismiss the proceeding for want of jurisdiction and illegality they have plainly recognized that that issue is now ripe for decision.

That the decisions in the *Aircraft & Diesel Equipment Corp.*, *Macauley*, and *Myers* cases do not compel, or even justify, the decision of the court below is, we believe, made clear by *Allen* v. *Grand Central Aircraft Co.*, 347 U. S. 535. There, an employer charged with violations of the wage stabilization provisions of the Defense Production Act of 1950 sought to enjoin administrative proceedings to determine his guilt, on the grounds (1) that the proceedings would cause irreparable damage, (2) that the Act had in pertinent part expired, and (3) that in any event the Act did not authorize the proposed administrative proceedings. A three-judge District Court granted the injunction, and appeal was taken to this Court under 28 U. S. C., Section 1253. If the decision of the court below in the instant case were correct, the proper course for this Court in the *Allen* case would have been to reverse the District Court and direct dismissal of the action because of appellant's having "failed to exhaust his administrative remedy."

This Court did not do so. Holding, on familiar principles, that the mere fact of being required to undergo administrative proceedings did not in itself constitute a cognizable "irreparable injury", the Court nevertheless proceeded to consider and decide (against the employer) the issues of statutory power. The following language from the opinion indicates the correct qualification of the "exhaustion" rule:

> • • • However, it is clear that *once the right of the Government to hold administrative hearings is established*, a litigant cannot enjoin them merely because they might jeopardize his bank credit or otherwise be inconvenient or embarrassing. [Citing *inter alia* the *Aircraft & Diesel Equipment Corp.* and *Myers* cases]
>
> It is appellee's principal claim that there is *no properly authorized administrative procedure for it to exhaust* and that the administrative authorities

> who seek to determine its case have no lawful right to do so. *We, therefore, go directly to the heart of this controversy, which is the question whether the administrative enforcement of the 1950 wage stabilization program has been validly authorized* (pp. 540-541; emphasis supplied).[3]

So here. The questions presented by petitioner to the courts below are whether there is any validly authorized procedure for disbarring him from practice before the Commission, and if so whether the procedure has been instituted in violation of statute. The Court of Appeals has held that these questions may not *now* be presented to the courts for the sole reason that the Commission might after hearing exonerate petitioner, and thus obviate judicial decision on his legal rights. We believe that this is a misconception of the "exhaustion" doctrine, which should be corrected by this Court.

2. The question of the applicability and meaning of Section 9(b) of the Administrative Procedure Act in relation to this and other types of administrative proceedings is peculiarly one for judicial determination at the outset rather than the conclusion of the proceedings. For in Section 9(b) Congress manifested a plain intent to preclude the institution of administrative proceedings unless certain conditions were first met by the agency. To require a respondent to go through administrative proceedings before being entitled to raise in court the question whether the proceedings were instituted in compliance with statute

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[3] Indeed, similar qualification was expressed in Justice Brandeis's opinion in the *Myers* case itself, when he said (303 U. S. at 47):

> First. There is no claim by the Corporation that the statutory provisions and the rules of procedure prescribed for such hearings are illegal; or that the Corporation was not accorded ample opportunity to answer the complaint of the Board; or that opportunity to introduce evidence on the allegations made will be denied. * * *

is in effect to deprive him of the very protection the statute offered him *even if he is ultimately successful* in his contention that the statute has been violated. The decision of the court below thus in itself creates, for this and all other respondents, a threat of irreparable injury, through the deprivation of a statutory right, which cannot be remedied even should the respondent win. The correctness of the decision below is not dependent on any facts peculiar to the instant case, and is of moment far beyond the bounds of petitioner's particular concerns. This is especially so in the light of the notorious reluctance of administrative agencies to give more than lip service to the requirements of Section 9(b).[4]

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

CHESTER T. LANE,
Counsel for Petitioner.

ALEXANDER B. HAWES,
of Counsel.

Dated: February 21, 1958.

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[4] See, for instance, the attitude of the Securities and Exchange Commission that since it is authorized to act only in the "public interest" all its proceedings fall within the "public interest" exception to the requirements of Section 9(b). *In the Matter of Sterling Securities Co.*, Securities Exchange Act Release No. 5527, June 5, 1957, CCH Federal Securities Law Reporter, Par. 76,525; cf. R. 27a.

APPENDIX A

Statutes

ADMINSTRATIVE PROCEDURE ACT
60 Stat. 236, 5 U. S. C. Sec. 1001

Sec. 2. As used in this Act—

• • •

(c) *License and licensing.*—"License" includes the whole or part of any agency permit, certificate, approval, registration, charter, membership, statutory exemption or other form of permission. "Licensing" includes agency process respecting the grant, renewal, denial, revocation, suspension, annulment, withdrawal, limitation amendment, modification, or conditioning of a license.

• • •

Sec. 3. Except to the extent that there is involved (1) any function of the United States requiring secrecy in the public interest or (2) any matter relating solely to the internal management of an agency—

(a) *Rules.*—Every agency shall separately state and currently publish in the Federal Register (1) descriptions of its central and field organization including delegations by the agency of final authority and the established places at which, and methods whereby, the public may secure information or make submittals or requests; (2) statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal or informal procedures available as well as forms and instructions as to the scope and contents of all papers, reports, or examinations; and (3) substantive rules adopted as authorized by law and statements of general policy or interpretations formulated and adopted by the agency for the guidance of the public, but not rules addressed to and served upon named persons in

accordance with law. No person shall in any manner be required to resort to organization or procedure not so published.

* * *

Sec. 6. Except as otherwise provided in this Act—

* * *

(b) *Investigations.*—No process, requirement of a report, inspection, or other investigative act or demand shall be issued, made, or enforced in any manner or for any purpose except as authorized by law. Every person compelled to submit data or evidence shall be entitled to retain or, on payment of lawfully prescribed costs, procure a copy or transcript thereof, except that in a nonpublic investigatory proceeding the witness may for good cause be limited to inspection of the official transcript of his testimony.

* * *

Sec. 9. In the exercise of any power or authority—

* * *

(b) *Licenses.*—In any case in which application is made for a license required by law the agency, with due regard to the rights or privileges of all the interested parties or adversely affected persons and with reasonable dispatch, shall set and complete any proceedings required to be conducted pursuant to sections 7 and 8 of this Act or other proceedings required by law and shall make its decision. Except in cases of willfulness or those in which public health, interest, or safety requires otherwise, no withdrawal, suspension, revocation, or annulment of any license shall be lawful unless, prior to the institution of agency proceedings therefor, facts or conduct which may warrant such action shall have been called to the attention of the licensee by the agency in writing and the licensee shall have been accorded opportunity to demonstrate or achieve compliance with all lawful requirements.

* * *

SEC. 10. Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion—

(a) *Right of review.*—Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.

(b) *Form and venue of action.*—The form of proceeding for judicial review shall be any special statutory review proceeding relevant to the subject matter in any court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action (including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus) in any court of competent jurisdiction. Agency action shall be subject to judicial review in civil or criminal proceedings for judicial enforcement except to the extent that prior, adequate, and exclusive opportunity for such review is provided by law.

(c) *Reviewable acts.*—Every agency action made reviewable by statute and every final agency action for which there is no other adequate remedy in any court shall be subject to judicial review. Any preliminary, procedural, or intermediate agency action or ruling not directly reviewable shall be subject to review upon the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final shall be final for the purposes of this subsection whether or not there has been presented or determined any application for a declaratory order, for any form of reconsideration, or (unless the agency otherwise requires by rule and provides that the action meanwhile shall be inoperative) for an appeal to superior agency authority.

* * *

Regulations

SECURITIES AND EXCHANGE COMMISSION

Rules of Practice
Rule II.

Appearance and Practice Before the Commission.—(a) An individual may appear in his own behalf, a member of a partnership may represent the partnership, a bona fide officer of a corporation, trust or association may represent the corporation, trust or association, and an officer or employee of a State commission or of a department or political subdivision of a State may represent the State commission or the department or political subdivision of the State, in any proceeding.

(b) A person may be represented in any proceeding by an attorney at law admitted to practice before the Supreme Court of the United States, or the highest court of any State or Territory of the United States, or the Court of Appeals or the District Court of the United States for the District of Columbia.

(c) A person shall not be represented at any hearing before the Commission or a hearing officer except as stated in paragraphs (a) and (b) of this rule.

(d) Any person appearing before or transacting business with the Commission in a representative capacity may be required to file a power of attorney with the Commission showing his authority to act in such capacity.

(e) The Commission may disqualify, and deny, temporarily or permanently, the privilege of appearing or practicing before it in any way to any person who is found by the Commission after hearing in the matter

(1) not to possess the requisite qualifications to represent others; or

(2) to be lacking in character or integrity or to have engaged in unethical or improper professional conduct.

(f) Contemptuous conduct at any hearing before the Commission or a hearing officer shall be ground for exclusion from said hearing and for summary suspension without a hearing for the duration of the hearing.

(g) For the purposes of this rule, practicing before the Commission shall include the preparation of any statement, opinion or other paper by any attorney, accountant, engineer or other expert, filed with the Commisison in any registration statement, application, report or other document with the consent of such attorney, accountant, engineer or other expert.

APPENDIX B

Opinion and Judgment of the Court Below

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14103

MORRIS MAC SCHWEBEL,

Appellant,

—v.—

ANDREW D. ORRICK, HAROLD C. PATTERSON, EARL F. HASTINGS, JAMES C. SARGENT,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Decided January 30, 1958

MR. CHESTER T. LANE for appellant. MR. ALEXANDER B. HAWES also entered an appearance for appellant.

MR. DAVID FERBER, Assistant General Counsel, Securities & Exchange Commission, with whom MR. THOMAS G. MEEKER, General Counsel, Securities & Exchange Commission, was on the brief, for appellees.

Before:

EDGERTON, *Chief Judge,*
and DANAHER and BURGER, *Circuit Judges.*

PER CURIAM:

Appellant asked the District Court to enjoin the Securities and Exchange Commission from conducting a hearing to determine whether appellant should be prevented from continuing to practice before the Commission. Though we think the District Court was right in dismissing the complaint, we think the plaintiff failed to exhaust his administrative remedy and the court therefore erred in ruling on the Commission's authority to disbar attorneys. *Camp* v. *Herzog*, 88 U. S. App. D. C. 373, 190 F. 2d 605.

Affirmed.

Judgment

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14,103 January Term, 1958.

C. A. 1510-57

MORRIS MAC SCHWEBEL,

Appellant,

v.

ANDREW D. ORRICK, HAROLD C. PATTERSON, EARL F. HASTINGS, JAMES C. SARGENT,

Appellees.

United States Court of Appeals
For the District of Columbia
Circuit

Filed
January 30, 1958

Joseph W. Stewart
Clerk

APPEAL FROM the United States District Court for the District of Columbia.

Before:

EDGERTON, *Chief Judge*, and DANAHER and BURGER, *Circuit Judges*.

THIS CAUSE came on to be heard on the record from the United States District Court for the District of Columbia, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is ordered and adjudged by this Court that the judgment of the said District Court appealed from in this cause be, and the same is hereby, affirmed.

Dated: January 30, 1958.

Per Curiam.